Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

SELF-REALIZATION FELLOWSHIP CHURCH,

Petitioner,

vs.

ANANDA CHURCH OF SELF-REALIZATION, FELLOWSHIP OF INNER COMMUNION AND JAMES WALTERS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1989, this Court interpreted for the first time the "work-made-for-hire" provisions of the Copyright Act of 1976, 17 U.S.C. § 101. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989). In so doing, it found that Congress had enacted a new statutory scheme expressly differentiating between works prepared by conventional "employees" within the scope of their employment which were to be treated as "for hire," and works by "independent contractors" which could be deemed to be "for hire" only if they fell within statutorily enumerated categories and were prepared pursuant to a written work-for-hire agreement. *Id.* at 747-48. The Court did *not* opine on the standards governing works-for-hire under the predecessor 1909 Copyright Act but did note that courts of appeal had adopted rules under the former Act extending work-for-hire treatment to works created by those who were not traditional employees. *Id.* at 748-49. The questions presented here affect the initial copyright ownership and the propriety of renewal of a vast number of 1909 Act works, published before 1978 and potentially protected until 2072, including all works presumably created "for hire" by independent contractors and by employees of closely-held or solely-owned (*e.g.*, loan-out) corporations.

1. Under the 1909 Copyright Act, are works-for-hire limited to works created: (a) in the course of "traditional, hierarchical relationships" between an employer and an employee or (b) in circumstances under which the hiring party exercises actual control over the artist's work – an

QUESTIONS PRESENTED – Continued

issue as to which the circuit courts of appeal are in irreconcilable conflict?

2. Even assuming *arguendo* that a religious leader is not a traditional employee of the organization he founded, may such an individual's writings for his religious organization be protected under the "corporate body" provisions of the copyright law (17 U.S.C. § 24 [repealed, but carried over in the transitional provisions of the Copyright Act of 1976, as amended, 17 U.S.C. § 304(a)(1)(B)(ii)]) and does the Ninth Circuit's preclusion of "corporate body" copyright protection for works created *by an individual* for a religious organization thereby improperly construe the Copyright Act to discriminate against religious organizations?

LIST OF PARTIES

The parties to the proceedings below are petitioner Self-Realization Fellowship Church and respondents Ananda Church of Self-Realization, Fellowship of Inner Communion and James Walters. Petitioner Self-Realization Fellowship Church is a California non-profit religious corporation with no parent company, subsidiaries, or affiliates that have issued shares to the public. Rule 29.1.

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OPINIONS BELOW

The March 23, 2000 Opinion of the Court of Appeals (the "Opinion") is reported at 206 F. 3d 1322, and is reprinted in the Appendix to this Petition at App. 1-17. The Summary Adjudication Orders and Judgment of the district court were unreported; they are reprinted in the Appendix at App. 18-42.

JURISDICTION

The Opinion and Judgment of the Court of Appeals were entered on March 23, 2000. A timely petition for rehearing and a suggestion for rehearing en banc were denied by an Order filed on July 19, 2000. App. 43. On October 10, 2000, Petitioners obtained from Associate Justice Sandra Day O'Connor an extension of time until November 16, 2000 within which to file this Petition. App. 44-45. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First and Fourteenth Amendments to the United States Constitution are reprinted in the Appendix at App. 46. The pertinent portions of sections 24 and 26 of the 1909 Copyright Act, as amended, and sections 101, 201(a), 201(b), 302(a), 304(a) and 304(b) of the Copyright Act of 1976, as amended, are reprinted in the Appendix at App. 46-52.

STATEMENT OF THE CASE

1. Factual Background

Self-Realization Fellowship Church ("SRF") is a non-sectarian religious organization founded in 1920 by Paramahansa Yogananda, a Hindu yogi from India. Yogananda established SRF to promulgate the principles of Kriya Yoga, an ancient Indian philosophy of meditation and spiritual awakening, and to show the complete harmony and basic oneness of Christianity and Yoga philosophy and practice.

As the founder of SRF, Yogananda during his lifetime held a unique position within the organization. SRF's by-laws explicitly recognize that when Yogananda formed the Church "all funds, properties, tangible and intangible, of every kind held by Paramahansa Yogananda were turned over and transferred to this corporation,. . . . " In exchange for Yogananda's "spiritual guidance and leadership," SRF's board of directors appointed Yogananda to be SRF's president for the rest of his natural life. Yogananda also served on SRF's board of directors but did not control it. He was only one of several board members and after the formation of SRF, he explicitly acknowledged that he was subject to the authority of SRF's board.

Often during his lifetime, Yogananda stated that he founded SRF so that a strong central organization would exist that could continue to teach his philosophies and principles. Except when he was traveling, Yogananda lived at SRF facilities and SRF provided him with room, board and a small monthly stipend in exchange for the services he provided. Yogananda's principal duties at SRF were teaching, writing and leading devotional services.

Most of Yogananda's writings were for SRF's periodicals, the copyrights to which were registered in the name of SRF. Besides articles, SRF also published book-length works by Yogananda. The vast majority of copyrights in these works were also registered in SRF's name. SRF routinely filed timely renewals of copyright in its name for these various works.

For tax purposes, Yogananda was unquestionably an employee of SRF, which withheld taxes from the modest monthly stipend (about $50) it paid him. A written "worker agreement" signed by Yogananda on October 20, 1939 also confirmed his status as an employee for all other purposes.

Often throughout his life, Yogananda publicly stated that he had rid himself of all personal possessions by giving everything he owned and might own to SRF, including all interests in his writings. After Yogananda's death in March 1952, SRF continued to grow and develop. At the time of Yogananda's death, SRF had physical custody of numerous unpublished manuscripts which Yogananda had requested SRF staff members to edit and publish as well as tape recordings of unpublished talks Yogananda had delivered. SRF continued to teach Yogananda's philosophies, and many posthumous works, edited and prepared for publication by SRF staff, appeared in SRF's periodicals which are sold to the public. Revenue from the sale of these writings, and sound recordings and photographs of Yogananda, are major sources of income for SRF and contribute to its ability to engage in its religious and charitable work.

Respondent James Donald Walters is the founder of respondent Ananda Church of Self-Realization ("Ananda"). Walters had joined SRF as a monk three years prior to Yogananda's death. In 1962, he left after a dispute with SRF's board of directors and founded a church of his own a few years later. Walters created Ananda, which seeks to spread his versions of the teachings of Yogananda as well as his own teachings.

In the late 1980s, Ananda began to copy articles and poems by Yogananda that had originally appeared in SRF's copyrighted publications. On occasion, Ananda photocopied hundreds of pages from old editions of SRF's periodicals without permission. Ananda also reproduced nine photographs originally published in SRF publications and distributed dubbed tapes of Yogananda's talks. There is no dispute that Ananda copied all of these materials without any permission or license from SRF, or any claim to right from any other entity.

2. Proceedings in the District Court

SRF initiated this litigation over a decade ago by filing a complaint in the United States District Court for the Eastern District of California on July 2, 1990. The complaint sought to prevent the respondents from confusing the public, committing unfair competition and usurping SRF's profits by, *inter alia*, infringing SRF's trademarks, copyrights and other intellectual property. Among SRF's allegations were that respondents' adopted name "Church of Self-Realization" was confusingly similar to petitioner's long-established name "Self-Realization

Fellowship Church," that respondents used SRF's trademarks and copyrighted works in a manner calculated to confuse the public and to attract SRF's followers to respondents, and that respondents infringed SRF's initial and renewal term copyrights by reproducing and selling verbatim copies of scores of SRF's copyrighted works, most of which were written by Yogananda.

The district court initially granted and then vacated a preliminary injunction in SRF's favor on its trademark claims. After the court entered summary adjudication against SRF on the trademark claims, the Ninth Circuit affirmed some of the district court's rulings and reversed and remanded others. *See Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, 59 F. 3d 902 (9th Cir. 1995). In the meantime, Walters' Church of Self-Realization had adopted the name Ananda Church of Self-Realization and the caption of the case was changed to reflect this fact. SRF voluntarily dismissed its remaining trademark-based claims.

The parties then litigated SRF's claims for statutory copyright infringement as to various books, articles and photographs, common law copyright infringement as to various sound recordings and violations of California Civil Code section 990 (now section 3344.1) which relates to the unauthorized exploitation of a deceased personality's name or likeness. In separate orders, the district court granted Ananda summary adjudication as to all of SRF's remaining claims. App. 18-42.

Because the copied works were created before the January 1, 1978 effective date of the Copyright Act of 1976, the 1909 Copyright Act governed the validity and

renewal of SRF's statutory copyrights. *Stewart v. Abend*, 495 U.S. 207, 212 (1990). These copyrights ran for an initial 28-year term, and could be renewed for an additional 28-year term. *Id.*; 17 U.S.C. § 24 (repealed).[1] If the works were considered to be "authored" by Yogananda and if he survived to the vesting of the renewal term, they could be renewed by Yogananda or his assignee. *Stewart*, 495 U.S. at 219-20. If (as happened here) Yogananda died before renewal, and the works were not published in a periodical (which the Ninth Circuit has held would also give the periodical publisher the right to renew), Yogananda's statutory beneficiaries (if any) could renew. *Id.*

But, if SRF instead of Yogananda was deemed the "author" of such works as works-made-for-hire, or as corporate body works, or if such works were published in an SRF periodical, SRF could renew and claim legal title to the renewal copyright. *Id.*[2]

With respect to SRF's statutory copyright claims, the district court held that SRF held no federal copyrights in the works sued upon because: (1) Yogananda's works were not works-for-hire for SRF because Yogananda was "the motivating force behind his own writing" even if he

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[1] Congress has recently extended the renewal terms on copyrights secured between 1923 and 1977 so that works-for-hire have 95 years of protection from their first publication, or if unpublished, 120 years from their creation. 17 U.S.C. § 302(c); *see* 3 M. & D. Nimmer, *Nimmer on Copyright*, § 9.11[B][1] (2000) (hereinafter "*Nimmer*").

[2] By reason of the Copyright Renewal Act of 1992, Pub. L. 102-307, 106 Stat. 264 (June 26, 1992), works which first secured copyright protection between 1964 and 1977 were renewed automatically. 17 U.S.C. § 304(a).

was employed by SRF; (2) the fact that SRF "financed the publication and distribution of Yogananda's works" was deemed insufficient to raise a triable issue about "for hire" status; (3) as a matter of law, the corporate body doctrine did not apply because Yogananda purportedly had taken only a "simple vow" of poverty and possessed some property (however trivial) instead of adopting a "solemn vow" in which he would possess absolutely no property in his name, relying on *Schmid Brothers, Inc. v. W. Goebel Porzellanfabrik K.G.*, 589 F. Supp. 497 (E.D.N.Y. 1984); (4) SRF did not raise a triable issue whether Yogananda had assigned his statutory or common law copyrights to SRF; (5) thus, Yogananda was treated as the author and initial owner of any federal copyrights to the works at issue; (6) because Yogananda died before renewal, under the doctrine in *Stewart v. Abend, supra,* renewal by SRF was ineffective as to those Yogananda works; and (7) there thus being no renewal by anyone authorized to renew under § 24 (Second Proviso) of the 1909 Copyright Act or § 304(a)(1)(C) of the Copyright Act of 1976, those works fell into the public domain. App. 18-21. In rendering these rulings, the district court ignored SRF's voluminous evidence that Yogananda intended at all times for SRF to own his writings so that the religious organization he founded would be able to continue to disseminate his teachings and flourish.[3]

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[3] The district court also rejected SRF's claim for infringement of certain sound recordings of Yogananda's talks based on California Civil Code section 980, holding that SRF failed to produce any evidence that SRF owned rights in the sound recordings. The court further held that SRF lacked proof of a chain-of-title establishing its ownership of various

3. Proceedings in the Court of Appeal

On appeal,[4] the Ninth Circuit affirmed some of the district court's orders and reversed and remanded others. Specifically, the appellate court affirmed the district court ruling that SRF could not maintain a claim for copyright infringement of works written by Yogananda based on the theory that SRF was the "author" of such works under the "work-for-hire" or "corporate body" doctrines. *See Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, 206 F. 3d 1322, 1326-27 (9th Cir. 2000), App. 6-8. On the other hand, the Ninth Circuit held that there was "a triable issue as to whether SRF held valid initial federal copyrights to Yogananda's writings through an informal assignment of Yogananda's common law copyrights," prior to initial publication by SRF. *Id.* at 1328, App. 9-11.

Thus, the panel reversed and remanded to the district court SRF's infringement claims based on works Yogananda had expressly or impliedly assigned to SRF before publication that were later copied by Ananda during their *initial* copyright terms. The Ninth Circuit also held, as a matter of first impression, that SRF could validly renew and own the copyrights to Yogananda works that were first published in SRF periodicals where SRF was

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photographs and threw out SRF's claims based on the exploitation of Yogananda's name or likeness under Civil Code section 990. App. 22-40. This Petition does not address those issues.

[4] The appeal addressed only statutory and common law copyright issues, as SRF did not appeal the district court's ruling on the Civil Code section 990 right of publicity claims.

the "proprietor" under section 24 (First Proviso) of the 1909 Copyright Act, 17 U.S.C. § 24 (repealed) and section 304(a)(1)(B) of the Copyright Act of 1976, 17 U.S.C. § 304(a)(1)(B). *SRF v. Ananda, supra,* 206 F. 3d at 1328-29, App. 11-14.

As to non-periodical works, however, the panel found that even if Yogananda had assigned the common law copyright and even purported to assign renewal rights in any federal copyright to SRF, such assignments were ineffective to transfer rights in the renewal terms unless Yogananda lived until the date of renewal, which he did not. *See Stewart v. Abend,* 495 U.S. 207, 219-20 (1990). Because the appellate court agreed with the district court that neither the work-for-hire nor corporate body doctrines applied to non-periodical works, it held that SRF also could not renew the copyrights to non-periodical works as the "author" of the works. 206 F. 3d at 1328-29; App. 12.[5]

Even though the Ninth Circuit necessarily held that SRF had substantial evidence that Yogananda intended for SRF to own the copyrights in various works he created – without which there would be no triable issue of an assignment – the panel nevertheless held, as a matter

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[5] The panel also ruled that SRF could maintain its claim, under California Civil Code section 980, to the infringement of its common law copyrights in certain sound recordings that were not subject to statutory copyright protection. *Id.* at 1329-30, App. 14-15. Finally, the panel held that, with respect to four different photographs, SRF presented a triable issue that it was the copyright owner based on evidence that the photographs were taken by SRF employees as works for hire. *Id.* at 1330-31, App. 15-17. Those rulings are not addressed by this Petition.

of law, that no work-for-hire relationship could be found in the absence of an "hierarchical relationship" of employer and employee. *Id.* at 1326-27, App. 6-7. No other authority has ever held that a for hire work depends on an "hierarchical relationship." The Ninth Circuit also ruled, contrary to every other circuit opinion that has discussed the matter, that a commissioning party must *actually exercise control over or supervise the creation of a work* for it to qualify as a "for hire" work under the 1909 Act. *Id.* at 1327, App. 7. Finally, the panel ignored the most authoritative commentary and held that the corporate body doctrine – which would appear to be uniquely applicable to works written by the leaders of religious organizations – is inapplicable, as a matter of law, to works created *by individuals* no matter what their intentions or circumstances. *Id.* at 1327, App. 8.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's Opinion creates an intolerable conflict among the circuits on a recurring issue of copyright law that requires national uniformity. The Opinion (1) puts vast copyright libraries at risk by threatening to cast into the public domain countless numbers of works created by officers or directors of corporations and thereby affects the use of one of the most common business forms in Hollywood, the "loan-out corporation," (2) creates confusion and encourages forum shopping to resolve important copyright ownership questions that affect works whose copyright terms may persist until the

year 2072,[6] and (3) invites litigation, regarding a vast number of works published before 1978, by pirates who will seek to make apparent copyright holders walk the plank to produce evidence supporting their actual creative supervision of artists who completed their work decades ago.

By its cramped interpretation of the corporate body doctrine, the Opinion below also effectively renders that statutory doctrine – in existence since 1909 – a nullity contrary to established principles of statutory construction. Especially in light of the Ninth Circuit's rule limiting work-for-hire status to traditional employment relationships, the corporate body doctrine must be construed in a manner that gives it meaning and encompasses non-traditional employment relationships such as works written by religious leaders for their religious organizations. This Court has never opined on the corporate body doctrine but ought to, because of its importance in protecting works written by officers, directors and founders of the corporations or other organizations they lead. Unless this matter is corrected, religious organizations would be disadvantaged compared to their secular counterparts in being able to secure copyright protection for works created by their leaders who often toil in non-traditional and non-hierarchical employment-like relationships.

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[6] Works copyrighted before 1978 are governed by the 1909 Copyright Act and some of them may be protected and subject to the 1909 Act rules as late as the year 2072. *See* 17 U.S.C. § 302(a), 304(a) and (b) (works first copyrighted between 1923 and 1978 are protected for 95 years under U.S. copyright law).

I. THE CIRCUIT COURTS HAVE REACHED AN IRRECONCILABLE CONFLICT ABOUT AN IMPORTANT AND RECURRING QUESTION OF FEDERAL COPYRIGHT LAW THAT REQUIRES NATIONWIDE UNIFORMITY; ONLY THIS COURT CAN RESOLVE THE CONFLICT

Under the 1909 Act, 17 U.S.C. § 24 (repealed), as under the 1976 Act, 17 U.S.C. § 201(a), copyright in a work vests initially in the author or authors of the work. However, under both Acts, in the case of a work-made-for-hire, the employer or other person for whom the work was prepared is considered the "author" unless the parties have otherwise agreed, and the author is the initial owner of the copyright. 17 U.S.C. § 26 (repealed); 17 U.S.C. § 201(b); 1 *Nimmer*, § 5.03[A].

In the early days of the 1909 Act, the case law treated as works-for-hire only those works made in the course of a traditional employment relationship. 1 *Nimmer*, § 5.03[B][1][a][i]. However, even in the early days, where a work was commissioned from a non-employee – an independent contractor or free-lancer – at the *instance and expense* of another, title in the work was presumed to belong to the commissioning party. *See Lumiere v. Robertson-Cole Distr. Corp.*, 280 F. 550 (2d Cir.), *cert. denied*, 259 U.S. 583 (1922); *Yardley v. Houghton Mifflin Co.*, 108 F. 2d 28, 31 (2d Cir.), *cert. denied*, 309 U.S. 686 (1940).[7]

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[7] The courts did not specify whether the commissioning party obtained title to the copyright by transfer (assignment) or whether that party should be deemed the initial author (for-hire), apparently because not very much depended upon the distinction in those cases.

Subsequently, the Second Circuit in *Brattleboro Publishing Co. v. Winmill Publishing Corp.*, 369 F. 2d 565 (2d Cir. 1966) and the Ninth Circuit in *Lin-Brook Builders Hardware v. Gertler*, 352 F. 2d 298 (9th Cir. 1965) first concluded, building on *Lumiere* and *Yardley*, that *independent contractors* could be deemed to have created a work "for hire" where as in *Lumiere* the work had been created at the "instance" and "expense" of the commissioning party. "Instance" has been defined to mean simply that the commissioning party was at least one motivating factor in having the work prepared and "expense" simply means that the commissioning party has paid a fee or sum for the rights in the work. *Playboy Enterprises, Inc. v. Dumas*, 53 F. 3d 549, 555-56 (2d Cir. 1995); 1 *Nimmer*, § 5.03[B][2][c].

Despite this distinction in for-hire analysis between a work created (1) by an employee within the scope of employment, or (2) by an independent contractor at the "instance and expense" of another, the Ninth Circuit has now confused the rules by conflating two different circumstances. 206 F. 3d at 1326-27, App. 6-7. The Opinion's employer/employee analysis failed to address the evidence of Yogananda's very real employment relationship, corroborated by a written "worker agreement," the monthly stipend he was paid by SRF and SRF's records reflecting tax-withholding on Yogananda's behalf. Better evidence of actual employment could hardly exist.[8] It

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[8] *See also Community for Creative Non-Violence (CCNV) v. Reid*, 490 U.S. 730, 742 n. 8 (1989) (rejecting suggestion that term "employee" in 1976 Act's work for hire statute refers only to "formal, salaried employees").

appears the appellate court mistakenly concluded that the "instance and expense" test applies to employees as well as independent contractors. *Id.*

The Opinion ascribed to the Nimmer treatise the explanation that in the early years of the 1909 Act the for-hire doctrine was applied only to "traditional, *hierarchical relationships* in which the employee created the work as part of the 'regular course of business' of the employer". *Id.* (emphasis added). But neither *Nimmer* nor any other authority states that a for-hire work depends upon an "hierarchical" relationship. The Opinion offered no reason why the officer or owner of a business, or the founder or leader of a religious organization, could not also be treated as an employee or create for-hire works. The Opinion quite simply created a new, for-hire element to disqualify Yogananda's creations as "for hire" works.

The Ninth Circuit then erred by adopting an onerous and unprecedented new requirement to establish for-hire status of works created by independent contractors. Specifically, the court added a new "actual control" requirement, and thus created a precedent directly contrary to authorities in every other circuit that has considered the matter.

The Ninth Circuit found that as late as the last decade before the 1976 Act, "courts expanded the [for-hire] concept to include less traditional relationships, as long as the hiring party had 'the right to control or supervise the artist's work,' " citing *Nimmer* § 5.03[B][1][a][i]. 206 F. 3d at 1326-27, App. 7. In turn, *Nimmer* cites the Supreme Court decision in *CCNV v. Reid*, 490 U.S. 730 (1989) (*Reid*) and *Reid's* reliance upon

the Second Circuit's 1966 *Brattleboro* decision. But *Brattleboro* said nothing about control; it raised a for-hire presumption simply on the showing of "instance" and "expense." 369 F. 2d at 567-68. Nor does the *Reid* decision support *Nimmer*'s statement. This Court was only concerned with the issue whether the creator of a sculpture could be deemed to be an "employee" under the new work-for-hire definition set out in section 101 *of the 1976 Act*, which lacked any definition of "employee." 17 U.S.C. § 101. This Court reviewed varying tests used by the circuits *under the 1976 Act* and determined that the general common law of agency ought to determine whether the creator of a work under the 1976 Act was an "employee." 490 U.S. at 750-51. In the course of reaching that conclusion, the Court *rejected an argument* by CCNV (mistakenly relied upon by *Nimmer*) that even if the commissioned party did not otherwise qualify as an "employee," if the commissioning party exercised control over the work, that would make the commissioned party an "employee working within the scope of his employment." This Court did not opine whether control was an element required to raise a presumption that a work was made for hire under *the earlier 1909 Act*. *Id.* at 738-43.

Thus, the Ninth Circuit was mistaken in concluding even that a *right of control* was a required element under the 1909 Act to create a for-hire work. The Ninth Circuit compounded the error, and aggravated conflict among the circuits, by adding the additional requirement that SRF prove the *actual exercise* of control for each of the works which were at issue: "Moreover, there was no

evidence of supervision or control of Yogananda's work by SRF." 206 F. 3d at 1327, App. 7.[9]

This ruling directly conflicts with *all* circuits that have for any reason discussed a "right" of control. *See Playboy Enterprises, Inc. v. Dumas*, 53 F. 3d 549, 554 (2d Cir. 1995) (publisher held to be employer for hire in part because it "could have exercised requisite power to control or supervise the creator's work"); *Brunswick Beacon, Inc. v. Schock-Hopchas Publishing Co.*, 810 F. 2d 410, 412 (4th Cir. 1987) ("Before [the effective date of the Copyright Act of 1976], it mattered little, if at all, that the commissioner neither possessed nor exercised the right to direct the manner in which the work was done."); *Murray v. Gelderman*, 566 F. 2d 1307, 1310 (5th Cir. 1978) ("Actual exercise of that right [to direct and supervise the manner in which the work was being performed] is not controlling, and copyright is vested in the employer who has no intention of overseeing the detailed activity of any employee hired for the very purpose of producing the material.").

The actual exercise of control test also was criticized and rejected by this Court as a requirement for work-for-hire status under the 1976 Act due to the unpredictability it would inject in the creative process as to who owns the

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[9] The Ninth Circuit's opinion does not address Yogananda's statements that he was subject to SRF's board of directors or evidence that SRF's staff exercised editorial control. Defendants presented no evidence to show that SRF lacked the right of control or failed to exercise control with respect to the precise works at issue.

copyright. *Reid*, 490 U.S. at 750 ("Under [the actual control] approach, . . . parties would have to predict in advance whether the hiring party will sufficiently control a given work to make it the author."). This unpredictability is exacerbated for works governed by the 1909 Act due to the difficulty of trying to reconstruct the manner in which works were created decades ago, a relative eternity in the creative community. The Ninth Circuit's *unprecedented* requirement that *actual exercise of control be proven* will cause great problems for publishers and motion picture studios because in many cases, important witnesses are no longer living and documentary evidence is sparse or nonexistent.[10]

This Court must reconcile the conflict between the Ninth Circuit's imposition of a new "actual control" test and the Second, Fourth and Fifth Circuits' more lenient standard governing works-for-hire under the 1909 Act. Failure to intervene will lead to forum-shopping litigation being brought in the Ninth Circuit by pirates seeking to test the ability of purported copyright holders to establish – as best they can through ancient records – that they actually controlled the creation of a work sufficient to qualify as the authors of claimed for-hire works. The inevitable result will be the injection into the public domain of a vast number of still valuable works whose ownership, prior to the Ninth Circuit's Opinion, was thought to be protected.

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[10] The fact that most for-hire works now enjoy a 95-year term of protection greatly increases the proof problems. 17 U.S.C. §§ 302(c), 303(a).

II. THE NINTH CIRCUIT HAS FORECLOSED APPLICATION OF THE CORPORATE BODY DOCTRINE TO WORKS CREATED BY RELIGIOUS LEADERS ON GROUNDS THAT INFRINGE RELIGIOUS FREEDOM AND DENY EQUAL PROTECTION OF THE LAWS TO RELIGIOUS ORGANIZATIONS

The "corporate body" doctrine has never been addressed by this Court. A few courts in the Second Circuit have stated, *in dictum*, that they are hard-pressed to imagine a situation, other than a work-for-hire situation, where the doctrine might apply. Nevertheless, the corporate body status is embedded in the renewal provisions of section 24 of the 1909 Act, and was carried over into the transitional provisions of the 1976 Act, 17 U.S.C. § 304(a)(1)(B)(ii). It should not be interpreted as a nullity. Unfortunately, the Ninth Circuit did just that. It not only ignored one of the purposes of the doctrine, but foreclosed its application on grounds that infringe religious freedom and deny religious organizations equal protection under the Copyright Act.

In 1961, Barbara Ringer, the foremost authority on the renewal provisions of the 1909 Copyright Act, produced a Report to Congress addressing, *inter alia*, the corporate body doctrine. B. Ringer, *Renewal of Copyright*, Report of the Register of Copyrights on the Revision of the U.S. Copyright Law, Study No. 31, 86th Cong., 2d Sess., Copyright Law Revision Studies Prepared for the Subcomm. on Patents, Trademarks and Copyrights of the Senate Comm. on the Judiciary (Comm. Print 1961)

("Ringer Report").[11] Ms. Ringer specifically identified two situations in which the doctrine might apply:

> (1) A work written by members of a religious order or similar organization where the *individual authors* were not exactly employees for hire but at the same time had no personal property right in the work.
>
> (2) A work written by *an official* or major shareholder of a corporation, where the work was written directly for the corporation but not as an employee [sic] for hire.

Ringer Report at 137 n. 215 (emphasis added), cited in *Epoch Producing Corp. v. Killiam Shows, Inc.*, 522 F. 2d 737, 748 n. 9 (2d Cir. 1975).

Both examples have direct application here. Yogananda, a member of a religious order, wrote under circumstances which the Ninth Circuit concluded did not precisely fit a "traditional" employer/employee relationship. 206 F. 3d at 1326-27, App. 6-7. The Ninth Circuit noted evidence that Yogananda observed a vow of poverty which led him to renounce ownership of all personal property in favor of his earthly bounty, SRF. *Id.* at 1325,

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[11] Barbara Ringer, later the Register of Copyright, was commissioned to prepare this Report to Congress, which was relied on heavily during the 20-year revision process leading to the 1976 Act. *See Mills Music, Inc. v. Snyder*, 469 U.S. 153, 158-61, 170-75 (1985). Congress included the "corporate body" doctrine in section 304(a) after being advised by this Report. *See also id.* at 183 n. 7 (White, J., dissenting) (expressly citing Barbara Ringer's Study No. 31 on *Renewal of Copyright* on another point); *Stewart*, 495 U.S. at 224 (same).

App. 3.[12] And, the Ninth Circuit recognized that "Yogananda served as SRF's President and as a member of its Board of Directors." *Id.*, App. 2. Works he wrote thus also fit within Ms. Ringer's second example.

Nevertheless, the Ninth Circuit quoted *dictum* from the Second Circuit to the effect that the corporate body doctrine "has no application to works . . . which are authored and produced by one identifiable person either *as an employee for hire* or *as an independent author.*" 206 F. 3d at 1327, App. 8, quoting *Epoch*, 522 F. 2d at 748 (emphasis added). But, this statement does not preclude application of the corporate body doctrine *to an individual work* – only to works made for-hire or works created as independent works. It begs the question when a work by an individual may qualify as a corporate body work. The "conceivable examples" *Epoch* cited from the Ringer Report only underscored the distinct possibility that works written by individual members of religious orders or corporate officers could be corporate body works. *Id.*, 522 F. 2d at 748 n. 9.

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[12] In *Schmid Bros. v. W.P. Goebel Porzellanfabrik*, 589 F. Supp. 497, 505 (E.D.N.Y. 1984), a district court ruled that the corporate body doctrine did not apply to works created by a nun who only took a "simple vow" rather than a "solemn vow." The implication of the opinion is that even where, as there, a single identifiable member of a religious order created a work, the corporate body doctrine might apply if the individual vowed not to own any personal property at all. In the instant case, it is at least an issue of fact whether Yogananda had sufficiently renounced any ownership of personal property so as to qualify even under the restrictive reading of the doctrine adopted in *Schmid*.

Surprisingly, the Ninth Circuit then concluded that the "the little case law there is thus indicates that [the corporate body doctrine] has no application where a single, *identifiable individual* rather than a faceless corporate mass has created the work in question," citing *Donaldson Publ'g Co. v. Bregman, Vocco & Conn, Inc.*, 375 F. 2d 639, 643 (2d Cir. 1967), which merely asserted the proposition that the doctrine's meaning "is not entirely plain" but its "scope is quite limited." 206 F. 3d at 1327, App. 8.[13] But *Donaldson* does not stand for the cited proposition. Without explanation, it simply concluded that the doctrine "does not apply to the facts of this case," 375 F. 2d at 643, where a composer set up a company to license his works but then ignored it and had substantially all the proceeds flow directly to him.

The effect of the Ninth Circuit's Opinion is to limit the corporate body doctrine only to those works that would otherwise qualify as works-for-hire. As a result, religious organizations – one of the key examples cited by Ms. Ringer of *entities* that could qualify as corporate bodies – are precluded from enjoying the fruits of the intellectual property created by their leaders. It is precisely because such leaders may not be "exactly

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[13] The Ninth Circuit's Opinion is inconsistent with the statutory description of a corporate body work, which refers to "any work copyrighted by a corporate body (otherwise than as an assignee or licensee *of the individual author*)." *See* 1909 Act, 17 U.S.C. § 24 (first proviso) (repealed); 1976 Act, 17 U.S.C. § 304 (a)(1)(B)(ii) (emphasis added). Obviously, if works by "individuals" were excluded from Congress' definition of a corporate body work, there would be no need to specify that *assignees* or *licensees* of an "individual author" were excluded.

employees for hire but at the same time [have] no personal property rights in the work" they create for their religious organizations, that the corporate body doctrine exists. Ringer Report at 137 n. 215.

Unless the Supreme Court addresses this important issue, religious organizations such as SRF will be unfairly discriminated against compared to their secular counterparts that rely on more traditional employer/employee relationships. *See Jones v. Wolf*, 443 U.S. 595, 603 (1979) (to be constitutional, laws applied to church property disputes must be neutral and "flexible enough to accommodate all forms of religious organization and polity."). This will detrimentally impact SRF's constitutional rights to religious expression and deprive SRF of equal protection under the laws. U.S. Const., Amends. I and XIV; App. 46. *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995) (unconstitutional to discriminate against religious groups by denying them equal access to facilities available to all); *Religious Technology Center v. Scott*, 660 F. Supp. 515, 519 (C.D. Cal. 1987) (failure to confer copyright protection on religious works in circumstances under which secular works would be protected "offend[s] the First Amendment's guarantee of freedom of religion").

In this case, SRF has been deprived of copyright protection to religious works that are central to its mission only because, unlike secular corporations, the works were not created in a "traditional, hierarchical relationship" of employer and employee. Citing to *Everson v. Board of Education*, 330 U.S. 1, 16 (1947), the Ninth Circuit recently set forth the following admonishment which would seem to have equal application here:

> [W]e must be careful not to deprive religious organizations of all recourse to the protections of civil law that are available to all others. Such a deprivation would raise its own serious problems under the Free Exercise Clause. [citation omitted] It would also leave religious organizations at the mercy of anyone who appropriated their property with an assertion of religious right to it.

Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar, 179 F. 3d 1244, 1248 (9th Cir. 1999). This Court should address the application of the corporate body doctrine to religious works to ensure that religious organizations such as SRF enjoy the same benefits to copyright protection enjoyed by other organizations.

CONCLUSION

For all the foregoing reasons, this Petition for Certiorari should be granted.

November 15, 2000

Respectfully submitted,

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SELF-REALIZATION FELLOWSHIP CHURCH, a California corporation, Plaintiff-Appellant,

v.

ANANDA CHURCH OF SELF-REALIZATION, a California corporation; Fellowship of Inner Communion, a California corporation; James Walters, aka Sri Kriyananda, Defendants-Appellees.

No. 97-17407.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Feb. 15, 2000.

Decided March 23, 2000.

Louis P. Petrich, Leopold, Petrich & Smith, Los Angeles, California, for the plaintiff-appellant.

Glenn W. Trost, Coudert Brothers, Los Angeles, California, for the defendants-appellees.

Appeal from the United States District Court for the Eastern District of California; Edward J. Garcia, District Judge, Presiding. D.C. No. CV-90-00846-EJG.

Before: SCHROEDER, NOONAN, and TASHIMA, Circuit Judges.

SCHROEDER, Circuit Judge:

This litigation war between two rival churches concerns copyrights to the writings, photographs, and sound recordings of Swami Paramahansa Yogananda. The plaintiff, Self-Realization Fellowship Church ("SRF"), claims that it holds valid copyrights to all of the works. The defendants and admitted copiers are a breakaway church and its leader, Ananda Church of Self-Realization and

James Walters ("Ananda"). They contend that none of the copyrights are valid.

The district court granted summary judgment in favor of Ananda. On appeal, SRF raises various issues. The most important are whether the works of a religious leader, living under a vow of poverty in the church he founded, can be considered "works for hire" or the works of a "corporate body" within the meaning of the 1909 Copyright Act and, in the alternative, whether SRF has adduced evidence from which a jury could conclude that a valid assignment of common law copyrights occurred.

With regard to Yogananda's writings and spoken lectures, we hold that the works are not works for hire or the works of a corporate body, so that the common law copyrights did not vest in the church as a matter of law. We hold that there are triable issues with regard to the purported assignments and remand for further proceedings on those issues. We also hold that there is a triable issue regarding whether some of the photographs involved in this appeal were works for hire.

BACKGROUND

Yogananda, a monk of the Swami order, founded SRF in 1935 when he arrived in California from India. Until his death in 1952, Yogananda lived in quarters that SRF provided and received from SRF a small monthly stipend. Yogananda served as SRF's president and as a member of its board of directors. While living at SRF, Yogananda wrote books and articles and gave religious lectures. The lectures were recorded and later published by SRF. SRF arranged for the publication of Yogananda's books, and

published the articles in its own magazine. SRF also published in its magazine various photographs of Yogananda and other SRF leaders.

In the district court, both parties introduced evidence of Yogananda's relationship with SRF and his intent regarding the ownership of his works and the copyrights to those works. For example, Yogananda observed a vow of poverty, which led him to assign all of his possessions to SRF in a written assignment dated May 28, 1935. The assignment transferred to SRF Yogananda's "books, lessons, monthly araeceptum, furnitures, personal properties including shawls, blankets, portable temple of silence, my handwritings, typewriters, mimeograph machine, cooking utensils and all machinery, icebox, files, victrola, radio, and/or any other personal property which I may own and which is not described or enumerated herein." In 1939, Yogananda signed a standard SRF form agreeing to renounce any claim for compensation in exchange for "the privilege of being accepted as a worker" by SRF. SRF obtained copyrights on most, but not all, of Yogananda's published books in its own name, describing several of them as "works for hire." Of particular relevance to Ananda's position is the fact that in 1951 Yogananda entered into an agreement with an individual hired to translate six of his works into Spanish for distribution in Mexico. The agreement provided that the "Mexican copyrights" to the English and Spanish versions of those six works would be obtained in Yogananda's name rather than the name of the translator.

Ten years after Yogananda's death, James Walters, also known as Sri Kriyananda, left SRF and formed Ananda, a rival church dedicated to the teachings of

Yogananda. Ananda admits to copying the books, articles, recordings, and photographs involved in this appeal. SRF filed an infringement action in 1990. We decided an earlier appeal regarding trademark claims in 1995. *See Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, 59 F.3d 902 (9th Cir.1995). The district court entered a final judgment disposing of all copyright claims in 1997, and this appeal followed.

DISCUSSION

Because all of the copied works were created before 1978, the Copyright Act of 1909 governs the validity of the initial copyrights. *See Roth v. Pritikin*, 710 F.2d 934, 938 (2d Cir.1983). These initial statutory copyrights ran for a 28 year term. *See* 17 U.S.C. § 24 (repealed). Under the 1909 Act, the holder of the common law copyright at the time of publication, either the author or the author's assignee, was the party entitled to receive statutory protection. *See Urantia Found. v. Maaherra*, 114 F.3d 955, 960 (9th Cir.1997). Assignments did not have to be in writing to be enforceable. *See Magnuson v. Video Yesteryear*, 85 F.3d 1424, 1428 (9th Cir.1996). Authors could assign their common law copyrights "without the necessity of observing any formalities." *Urantia Found.*, 114 F.3d at 960.

Blanket copyrights on magazines were sufficient to "protect all the copyrightable components of the work copyrighted" and gave to the copyright proprietor "all the rights which he would have if each part were individually copyrighted under" the Act. 17 U.S.C. § 3 (repealed). The weight of the case law has concluded that this means that a blanket copyright gives a magazine

publisher rights in an individual contribution only if the publisher owns the common law copyright as the author of the contribution, or as the author's assignee. *See Mail & Express Co. v. Life Pub. Co.*, 192 F. 899, 900 (2d Cir.1912); *The Williams & Wilkins Co. v. United States*, 172 U.S.P.Q. 670, 675 (Ct.Cl.1972); *Kinelow Publ'g Co. v. Photography in Bus., Inc.*, 270 F.Supp. 851, 853 (S.D.N.Y.1967); *Ilyin v. Avon Publications, Inc.*, 144 F.Supp. 368 (S.D.N.Y.1956); *Kaplan v. Fox Film Corp.*, 19 F.Supp. 780 (S.D.N.Y.1937).

The 1909 Act did not extend any protection to sound recordings, however. With respect to Yogananda's recorded lectures, SRF claims a common law copyright enforceable under California law. *See Klekas v. EMI Films, Inc.*, 150 Cal.App.3d 1102, 1108-09, 198 Cal.Rptr. 296 (1984) (explaining that before passage of the 1976 Act, works not protected by the federal copyright statute were protected by state law). Cal. Civ.Code § 980 extends common law copyright protection to sound recordings, and Cal. Civ.Code § 982 permits authors to transfer their rights in such works.

The copying at issue in this appeal took place at various times after 1962. Some works were copied during the initial copyright term, and some during the renewal term. The principal issues with respect to the works authored by Yogananda are, first, whether the works were "works for hire" or works produced by a "corporate body" within the meaning of the 1909 Act, and if not, whether Yogananda validly assigned his common law copyrights to SRF. The district court held that the works were neither works for hire nor produced by a corporate body, and we agree. The district court further held that there was no valid common law copyright assignment to

SRF. We disagree, and hold that SRF has presented triable issues regarding assignment.

Assuming that SRF can establish the validity of its initial copyright in each work, we must also decide a separate set of issues with respect to copying that took place during the works' renewal terms. This is because under the 1909 Act, renewal rights revert in most circumstances to the author's next of kin where, as here, the author was not living at the time the initial copyright expired. We hold that SRF was not entitled to renew its copyrights in books authored by Yogananda. We hold, however, that SRF was entitled to renew any valid initial copyrights in Yogananda's articles.

I. Works For Hire

SRF contends that it holds valid initial and renewal copyrights in Yogananda's writings through the "work for hire" doctrine. *See* 17 U.S.C. § 26 (repealed) (stating that the word 'author' shall include an employer in the case of works made for hire). This circuit has summarized the work for hire doctrine as follows: "[W]hen one person engages another, whether as employee or as an independent contractor, to produce a work of an artistic nature, . . . in the absence of an express contractual reservation of the copyright in the artist, the presumption arises that the mutual intent of the parties is that the title to the copyright shall be in the person at whose instance and expense the work is done." *Lin-Brook Builders Hardware v. Gertler,* 352 F.2d 298, 300 (9th Cir.1965). To survive summary judgment on a claim of work for hire, SRF must "present some credible evidence that [Yogananda's] work

was done at the instance and expense" of SRF. *Dolman v. Agee*, 157 F.3d 708, 712 (9th Cir.1998).

The Second Circuit has described the "instance and expense" test under the 1909 Act as an inquiry into whether "the motivating factor in producing the work was the employer who induced the creation." *Playboy Enter., Inc. v. Dumas*, 53 F.3d 549, 554 (2d Cir.1995). SRF has not introduced evidence that would demonstrate that it was at SRF's "instance" that Yogananda decided to write, teach, and lecture. Works motivated by Yogananda's own desire for self-expression or religious instruction of the public are not "works for hire." Furthermore, Nimmer explains that throughout much of the life of the 1909 Act, courts applied the work for hire doctrine only to traditional, hierarchical relationships in which the employee created the work as part of "the regular course of business" of the employer. Melville B. Nimmer and David Nimmer, *Nimmer on Copyright* § 5.03[B][1][a][i] (1999). In the last decade that the Act was effective, courts expanded the concept to include less traditional relationships, as long as the hiring party had "the right to control or supervise the artist's work." *Id.* We have described the rationale for the doctrine as a presumption that "the parties expected the employer to own the copyright and that the artist set his price accordingly." *May v. Morganelli-Heumann & Assocs.*, 618 F.2d 1363, 1368 (9th Cir.1980). SRF's relationship with Yogananda was not the type of traditional relationship in which such a presumption would necessarily hold. Moreover, there was no evidence of supervision or control of Yogananda's work by SRF. Yogananda's works were thus not "works for hire."

II. Corporate Body

The 1909 Act also refers in its renewal provision, 17 U.S.C. § 24 (repealed), to works copyrighted by a "corporate body." We conclude that Yogananda did not create his works as part of a corporate body. Like many other courts, we have not had occasion to interpret this part of section 24 of the 1909 Act, but the Second Circuit has noted that "what authoritative commentary exists concerning the 'corporate body' provision of § 24 indicates that it has no application to works . . . which are authored and produced by one identifiable person either as an employee for hire or as an independent author." *Epoch Producing Corp. v. Killiam Shows, Inc.*, 522 F.2d 737, 748 (2d Cir.1975) (citing Barbara Ringer, *Renewal of Copyright*, in *Report of the Register of Copyrights on the Revision of the U.S. Copyright Law*, Study No. 31, at 136-37 (1960)).

The little case law that there is regarding the "corporate body" exception thus indicates that it has no application to cases in which a single, identifiable individual rather than a faceless corporate mass has created the work in question. *See Donaldson Publ'g Co. v. Bregman, Vocco & Conn, Inc.*, 375 F.2d 639, 643 (2d Cir.1967) (stating that the meaning of the corporate body clause in section 24 "is not entirely plain" but that "its scope is quite limited"). SRF offers no more reasonable interpretation of the phrase. We therefore conclude that the district court correctly held that SRF did not hold copyrights to Yogananda's works through the corporate body doctrine.

III. Assignment

Even if Yogananda did not create his works directly for SRF as works for hire or as part of a corporate body, SRF's initial copyrights are still valid if before publication SRF received from Yogananda an informal assignment of his common law copyrights. *See Urantia Found.*, 114 F.3d at 960. Such assignments did not have to be in writing to be enforceable. *See Magnuson*, 85 F.3d at 1428 (stating that under the 1909 Act, common law copyrights could be transferred orally or by implication from the conduct of the parties).

SRF points to several factual matters established in the record: the 1935 Assignment from Yogananda to SRF of all his possessions; Yogananda's vow of poverty; Yogananda's general acquiescence in SRF's decision to copyright many of his works in its name; and SRF's physical possession of the manuscripts. These, SRF contends, constitute conclusive evidence that Yogananda informally assigned to SRF his common law copyrights in his books and periodical articles. Furthermore, SRF obtained initial statutory copyrights in its own name in the books written by Yogananda at issue in this appeal, and these copyrights are entitled to a presumption of validity under the 1909 Act because of the registration in SRF's name. *See* 17 U.S.C. § 209 (repealed) (stating that a certificate of copyright registration "shall be admitted in any court as prima facie evidence of the facts stated therein").

Ananda, for its part, submitted evidence showing that Yogananda obtained copyrights on other works, not at issue in this appeal, in his own name. Ananda also offered an interpretation of Yogananda's vow of poverty

indicating the vow was less than a complete renunciation of property rights. Ananda characterizes Yogananda's vow as "simple," rather than "solemn," arguing that Yogananda intended to retain some personal property and only wished to disavow profits. Ananda also points to the evidence that Yogananda sought to obtain Mexican copyrights in his own name, thus suggesting that Yogananda never intended to transfer any of his common law U.S. copyrights to SRF.

The district court characterized as "critical" the fact that some of SRF's copyright certificates describe SRF as the owner of a work for hire rather than an assignee. This circuit has held, however, that a party's own descriptions of the nature of its copyright at the time of copyright registration or renewal is not conclusive. *See Urantia Found.*, 114 F.3d at 963. *Cf. Lin-Brook*, 352 F.2d at 300 (holding that work could be a "work for hire" as a matter of law despite employer's decision to receive it through assignment from employee). Such descriptions may be self serving, and the copyright laws are not to be applied mechanically, facilitating premature injection into the public domain, but rather in a "fair and non-formalistic" manner. *See Urantia Found.*, 114 F.3d at 963.

The district court ultimately agreed with Ananda, accepting its interpretation of the vow of poverty and placing weight on the fact that not all of the works Yogananda produced during his lifetime were copyrighted in SRF's name. The existence of a transfer or assignment of common law copyright, however, is a factual question of the author's intent. *See id.* at 960. The 1935 assignment is not dispositive as to Yogananda's writings after 1935, but it is relevant to this factual issue.

While a jury may conclude that on balance the evidence demonstrates that Yogananda had no intent to transfer to SRF his common law copyrights, at the summary judgment stage, a district court is entitled neither to assess the weight of the conflicting evidence nor to make credibility determinations. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). SRF has introduced sufficient evidence to create a triable issue as to whether it held valid initial copyrights to Yogananda's writings through an informal assignment of Yogananda's common law copyrights. We therefore reverse the district court's grant of summary judgment with regard to any works copied in their initial copyright terms, and remand for further proceedings.

IV. Right of Renewal

With regard to writings copied during their renewal terms, SRF must establish its initial copyright and, in addition, establish that it was entitled to renew any validly obtained initial copyrights. The 1909 Act vested renewal rights in the author, if still living at the time the initial copyright term expired, or the author's next of kin or executor if the author was deceased. *See* 17 U.S.C. § 24 (repealed). The 1909 Act contained only four exceptions to this exclusive right of reversion. A copyright owner who was not the original author could renew copyrights in (1) posthumous works, (2) periodical, encyclopedic, and composite works, (3) works copyrighted by a corporate body (other than as an assignee or licensee of the original author), and (4) works made for hire. *See id.*

The word "posthumous," as it is used in copyright law and embodied in the first exception, is a term of art that refers to works unpublished at the time of the author's death in which the author at all times maintained the common law copyright. *See Bartok v. Boosey & Hawkes, Inc.*, 523 F.2d 941, 944 (2d Cir.1975). SRF does not claim that this exception applies. The third and fourth exceptions do not apply because, as we have already held, the work for hire and corporate body doctrines do not apply to Yogananda's writings as a matter of law. The only possible exception available to SRF at this point is the exception for "periodical, encyclopedic, and composite works."

With regard to books copied during their renewal terms, the district court's grant of summary judgment for Ananda must be affirmed. The books are not periodical, composite or encyclopedic works, nor does SRF contend that they are.

The articles that appeared in SRF's magazine, however, were published in a periodical. SRF itself held the copyright to each issue of the magazine. The 1909 Act allowed renewal by a copyright holder, even if not the original author or the author's next of kin, of copyrights to "periodical, encyclopedic, and collective works." 17 U.S.C. § 24 (repealed). A blanket copyright on a periodical protects its constituent parts as long as the publisher received the common law copyrights to those parts prior to publication. *See* 17 U.S.C. § 3 (repealed); *Mail & Express*, 192 F. at 900. Thus, if SRF succeeds at trial in proving that Yogananda informally transferred to SRF his common law copyrights in his individual articles, SRF's blanket copyrights on each issue of its magazine were

sufficient to give SRF rights to the articles as well. SRF would then have been entitled to renew these copyrights under the exception contained in section 24 for periodical works.

Until 1940, section 24 also permitted individual authors to renew copyrights in periodical contributions "when such contribution has been separately registered." In 1940, Congress deleted the separate registration requirement, permitting individual authors to renew copyrights in periodical contributions even if the only initial copyright on the work existed by virtue of the publisher's blanket copyright. Ananda argues that our decision in *Abend v. MCA, Inc.*, 863 F.2d 1465 (9th Cir.1988), *aff'd sub nom Stewart v. Abend*, 495 U.S. 207, 110 S.Ct. 1750, 109 L.Ed.2d 184 (1990), holds that as a result of the 1940 amendment, only the author of a periodical contribution retains a renewal right in the work. This is incorrect. In *Abend*, we recognized that the 1940 amendment granted a new renewal right in individual authors of magazine contributions. *See id.* at 1470-71. The discussion in *Abend* makes clear, however, that this new right did not extinguish the pre-existing right in the magazine publisher. Congress was simply concerned about situations in which the publisher went out of business before the initial copyright expired, leaving no one to renew the copyright and thus injecting the work prematurely into the public domain. *See id.* at 1471 (citing H.R.Rep. No. 1612, 76th Cong.3d Sess. 1 (1940)).

Under the unambiguous terms of section 24 of the 1909 Act, SRF was entitled to renew any initial copyrights in periodical articles that it validly obtained through an

informal assignment of Yogananda's common law copyrights. We therefore reverse the district court's grant of summary judgment with regard to all periodical articles, and remand for determination of the factual issues regarding assignment.

V. Recordings of Yogananda's Lectures

The 1909 Act does not cover sound recordings. SRF's rights, if any, in recordings of Yogananda's religious lectures are therefore governed by the common law of copyright and secured by California law. Cal. Civ.Code § 980 protects common law copyrights in sound recordings, and Cal. Civ.Code § 982 permits copyrights to be transferred. California courts define "works for hire" in a similar fashion as federal courts interpreting the provisions of the Copyright Act of 1909. *See Zahler v. Columbia Pictures Corp.*, 180 Cal.App.2d 582, 589, 4 Cal.Rptr. 612, 617 (1960) ("Where an employee creates something as part of his duties under his employment, the thing created is the property of his employer unless, of course, by appropriate agreement, the employee retains some right in or with respect to the product.").

The district court correctly rejected SRF's argument that Yogananda had created the recorded works as works for hire or as part of a corporate body, but incorrectly held that SRF had not presented a triable issue as to whether Yogananda ever assigned his common law copyrights in the recordings to SRF. We reverse the district court on the ground that SRF has introduced evidence sufficient to create a triable issue regarding assignment. For reasons we have already explained, the evidence is

conflicting on the critical issue of intent to transfer intellectual property rights.

VI. Photographs

The final category of works in which SRF claims valid copyrights are not works by Yogananda but rather photographs of Yogananda and another religious leader, taken by various third parties and published in SRF's magazine under its blanket copyright. For four of the photographs, SRF can identify no known photographer as the author. A fifth was taken by a man identified only by his name, Arthur Say, while the remaining photographs were taken by SRF employees Clifford Frederick and Durga Mata. The district court rejected SRF's claims that the photographs were taken as works for hire or by a corporate body, and held that SRF had not introduced a triable issue regarding assignment.

To succeed in a claim that the photographs were "works for hire," SRF must introduce evidence that the photographs were taken by an SRF employee or independent contractor at SRF's "instance or expense." *Lin-Brook*, 352 F.2d at 300. Likewise, in order to reach a jury on the issue of assignment, SRF must introduce evidence regarding the author's intent. *Urantia Found.*, 114 F.3d at 960. For the four photographs with unknown authors, SRF cannot satisfy either of these requirements; the district court's grant of summary judgment must be affirmed. Similarly, SRF offered no evidence that Arthur Say was an SRF employee or independent contractor or that he intended to transfer his common law copyrights to SRF.

We therefore also affirm the district court's grant of summary judgment with regard to the Arthur Say photograph.

The district court's grant of summary judgment with regard to the remaining photographs, all taken by SRF employees Clifford Frederick and Durga Mata, was principally based on the court's rejection of the declaration of Ananda Mata, SRF's Secretary and Treasurer. The district court characterized Ananda Mata's declaration testimony as "insufficient" and "uncertain," and commented on the possible inaccuracy of Ananda Mata's memory.

We conclude that the district court discounted the declarations by making a determination of credibility. This is something the court should not undertake at the summary judgment stage. *Liberty Lobby*, 477 U.S. at 250, 106 S.Ct. 2505. Ananda Mata's declarations set forth facts based on personal knowledge that give rise to a triable issue regarding whether the Frederick and Durga Mata photographs were created for SRF as works for hire. Ananda Mata stated in her first declaration that Frederick and Durga Mata were SRF employees and that photographing Yogananda constituted part of their employment. Personal knowledge can be inferred from an affiant's position. *See Sheet Metal Workers' Int'l Ass'n Local Union No. 359 v. Madison Ind., Inc.*, 84 F.3d 1186, 1193 (9th Cir.1996) (general manager's personal knowledge of hiring events could be presumed); *Barthelemy v. Air Lines Pilots Ass'n*, 897 F.2d 999, 1018 (9th Cir.1990) (CEO's personal knowledge of various corporate activities could be presumed). As a corporate officer of SRF, Ananda Mata could be expected to know the identity of SRF employees and their tasks. Ananda Mata further stated in

her declarations that the photographs were taken at her own instruction using equipment belonging to SRF. This constitutes personal knowledge of facts demonstrating that the photographs were taken at SRF's instance and expense.

We therefore hold that SRF has presented a triable issue as to whether the photographs taken by Frederick and Durga Mata were taken for SRF as works for hire. We reverse the district court's grant of summary judgment as to these works, and remand for further proceedings.

CONCLUSION

We affirm the district court's grant of summary judgment for Ananda with regard to books copied during their renewal terms, the photographs by unknown authors, and the photograph by Arthur Say. We reverse and remand for further proceedings the claims of copyright infringement pertaining to the books copied during their initial terms, all periodical articles, the sound recordings, and the photographs by Clifford Frederick and Durga Mata.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED. Each party to bear its own costs.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

SELF-REALIZATION FELLOWSHIP CHURCH, a California corporation,

Plaintiff,

v.

CHURCH OF SELF-REALIZATION, a California corporation; FELLOWSHIP OF INNER COMMUNION, a California corporation; and JAMES DONALD WALTERS, an individual,

Defendants.

_____/

AND RELATED COUNTERCLAIM.

_____/

CIV. NO. S-90-846 EJG/PAN

ORDER AFTER HEARING

(Filed July 1, 1992)

This matter was before the court on June 26, 1992 for hearing on several motions and for status conference. James P. Clark and Howard A. Jacobson appeared on behalf of plaintiff and counterdefendant. John R. Parsons and Sheila Rush appeared on behalf of defendants and counterclaimant. After considering the parties' written and oral arguments and the record in this matter, and for the reasons stated in the court's oral analysis in open court on the record, the court entered the following order.

1. Defendant's motion for summary adjudication of facts relating to copyright issues is granted.

2. Defendant's motion for reconsideration of the magistrate judge's orders dated March 25, 1992 and April 14, 1992 is granted, and upon reconsideration those orders are affirmed.

3. The court takes under submission plaintiff's motion for reconsideration of the court's April 24, 1992 ruling granting summary judgment regarding the federal trademark and trade name "Self-Realization;" defendant's motion for partial summary judgment on the state service mark "Paramahansa Yogananda;" and defendants' motion to dissolve the preliminary injunction. The court shall issue a memorandum opinion and order on those motions.

4. The status conference is continued to September 11, 1992 at 9:30 a.m. Ten days before the conference, counsel shall file supplemental status reports addressing the further scheduling of this action. Counsel may also address in their reports whether they would like the court to certify any of its rulings for interlocutory appeal and whether such certification would be appropriate under current Ninth Circuit and Supreme Court law.

IT IS SO ORDERED.

Dated: June 26, 1992.

/s/ Edward J. Garcia
EDWARD J. GARCIA, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

SELF-REALIZATION FELLOWSHIP CHURCH,

Plaintiff,

v.

CHURCH OF SELF-REALIZATION, et al.,

Defendants.

_____/

CIV. NO. S-90-846 EJG/PAN

ORDER AFTER HEARING

(Filed March 4, 1994)

This matter was before the court on February 25, 1994, for hearing on defendants' motion for summary adjudication of certain remaining copyright issues and for a status conference. James Clark appeared on behalf of plaintiff. Jon Parsons and Sheila Rush appeared on behalf of defendants. After considering the parties' written and oral arguments and the record in this matter, and for the reasons stated in the court's oral analysis in open court on the record, the court entered the following order.

1. Defendants' motion for partial summary judgment on certain remaining copyright issues is granted. The court finds that plaintiff lacks any copyright in:

a) any works by Yogananda first published by plaintiff after March 7, 1952 and prior to July 2, 1990, in which plaintiff registered the copyright in its own name **and which are within the scope of the complaint;** and

b) any works by Yogananda first published after March 7, 1952 and prior to July 2, 1990 in the form of contributions to periodicals which

periodicals were copyrighted by plaintiff as proprietor **and which are within the scope of the complaint.**

2. The status conference is continued to 9:00 a.m., May 20, 1994, to be heard in conjunction with defendants' anticipated motion for partial summary judgment concerning certain remaining issues.

IT IS SO ORDERED.

Dated: Mar. 1, 1994

/s/ Edward J. Garcia
EDWARD J. GARCIA, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

SELF-REALIZATION FELLOWSHIP CHURCH,
Plaintiff,

v.

CHURCH OF SELF-REALIZATION, et al.,
Defendant.
_____/

CIV. NO. S-90-846 EJG/PAN

MEMORANDUM OPINION AND ORDER

(Filed Jun 06, 1994)

This matter was calendared for hearing on May 20, 1994, on cross- and counter-motions for partial summary judgment and defendant's motion to change the caption of the case. After reviewing the record and the documents submitted the court determined that the motions were appropriate for resolution without oral argument. *See* Local Rule 230(h). Accordingly, the court vacated the hearing on the motions and ordered them submitted. The court now writes to set forth its ruling on the various submitted matters.

BACKGROUND

This is a copyright and trademark infringement action brought by one church against another, in which plaintiff alleges defendant illegally uses its name, literature, and the likeness of its deceased leader, Paramahansa Yogananda (Yogananda). Over the past three years, the court has issued several orders refining the scope of the complaint and counter-complaint filed in this action. Attempting to further this progress, each party presently

moves on partial summary judgment for several additional rulings in its favor. First, plaintiff and defendant both move for partial summary judgment on plaintiff's fourth cause of action for violation of Cal. Civ. Code § 990. Second, defendant moves for partial summary judgment on plaintiff's fifth cause of action for violation of Cal. Civ. Code § 980. Third, plaintiff and defendant both move for partial summary judgment on plaintiff's third cause of action for violation of federal copyright law, regarding nine specified photographs. Finally, defendant requests a change in the caption of the case. The court will address each matter seriatim.

The current motions call into question the meaning and application of some of this court's prior rulings. Of specific importance is the court's January 4, 1994 Memorandum Opinion and Order. Explicating prior rulings from the bench, the January 4 order clarified that plaintiff had failed to raise genuine issues of material fact as to the following, *inter alia*:

> 1. The May 28, 1935 Assignment from Yogananda to plaintiff did not transfer property not yet in existence on the date of the assignment.
>
> 2. Plaintiff's copyright of its periodicals containing works by Yogananda did not give plaintiff any copyright in articles Yogananda authored for the periodicals.

See Memorandum Opinion and Order of January 4, 1994, p. 3. These rulings are referred to below as "finding #1" and "finding #2" respectively.

DISCUSSION

A. Burdens of proof.

To warrant partial summary judgment in its favor, plaintiff's initial burden is to show no material dispute of fact exists, as to each element of its claim, so that it is entitled to judgment in its favor as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505 (1986). The burden then shifts to defendant to submit admissible evidence sufficient to create a genuine issue of fact on one or more essential elements of plaintiff's claims. The test in this regard is whether defendant produces evidence on which the jury could reasonably find for defendants. *Id.*

To prevail on its partial summary judgment motions, defendant must show either an absence of proof concerning an essential element of plaintiff's claim, or a defense which applies as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986). Once defendant meets its initial burden in either endeavor, the burden shifts to plaintiff to show a genuine issue for trial. *Id.*

B. Plaintiff's fourth claim for relief (Cal. Civ. Code § 990).

California Civil Code § 990 (§ 990), enacted in 1984, creates a cause of action to recover for unauthorized use of a deceased personality's publicity rights. Both parties move for partial summary judgment on plaintiff's § 990 claim. Plaintiff argues a certain 1935 Assignment transferred Yogananda's publicity rights to plaintiff, and defendant violated these rights by using Yogananda's

name, photograph and likeness to advertise and promote their commercial activities.

Defendant first argues that § 990 created retroactively-vesting rights in heirs, but not in inter vivos transferees, and therefore plaintiff cannot possibly have rights to Yogananda's likeness under the statute. Next, defendant argues that even if § 990 could apply in this retroactive fashion, this court's prior interpretation of the 1935 Assignment precludes a finding that Yogananda transferred his § 990 rights to plaintiff. Finally, defendant attempts to establish two defenses to the § 990 claim, the noncommercial use defense and the public affairs exemption defense.

This Memorandum Opinion and Order will address all of these arguments through the following three queries: (1) whether § 990 permits retroactive vesting in inter vivos transferees; (2) whether the 1935 Assignment transferred Yogananda's publicity rights to plaintiff; and (3) whether defendant has established a defense to alleged § 990 violations, as a matter of law.

1. Whether Cal. Civ. Code § 990 permits retroactive vesting in inter vivos transferees.

In the instant motions, the parties vigorously debate the retroactivity of Cal. Civ. Code § 990. Defendant frames the issue, citing the California statutory presumption against retroactivity as affirmed in the courts. *See*, Cal. Civ. Code § 3; *Evangelatos v. Superior Court*, 44 Cal.3d 1188, 246 Cal. Rptr. 629, 641 (Cal. 1988). However, this court does not perceive the issue as a simple one of retroactivity. Defendant's cited law pertains to retroactive

application of a statute. But here, the question presented is more accurately one of retroactive vesting, as to which the presumption against retroactivity does not pertain.

Under the plain language of the statute, post-mortem publicity rights are transferrable [sic] inter vivos (by "contract" or "means of trust"), by "testamentary documents," or by intestate distribution. *See* Cal. Civ. Code §§ 990 (a), (b), (c), and (d). These rights exist for any "deceased personality" whose name, voice, signature, photograph, or likeness has commercial value at the time of his or her death, including any "natural person who has died within 50 years prior to January 1, 1985." Cal. Civ. Code § 990(h). Under this interpretation, § 990 created retroactively vesting publicity rights in Yogananda, who died in 1952, and these rights passed either by will or intestate unless Yogananda transferred them inter vivos.

Defendant rejects this straightforward reading of the statute, and argues that the legislative history of § 990 shows an intent to favor heirs. Defendant's position lacks merit. As outlined below, the legislative record shows no intent to permit retroactive vesting in heirs, but only prospective vesting in devisees and inter vivos transferees.

Prior to passage of § 990, California courts recognized common law publicity rights. In 1979, the California Supreme Court acknowledged those common law rights while delineating their scope. *See Lugosi v. Universal Pictures*, 25 Cal.3d 824, Sup., 160 Cal. Rptr. 323 (Cal. 1979). In *Lugosi*, the state high court held that the right to

exploit name and likeness is personal, and must be exercised, if at all, during the personality's lifetime. *Id.* The court reasoned that publicity rights derive from the "torts of privacy," and privacy interests no longer require protection once the party holding the interest is dead. *Id.*

The California legislature enacted California Civil Code § 990 to declare that publicity rights sound in property, not tort. As property interests, these rights are descendible, devisable, and can be transferred inter vivos. *See* McCarthy, *The Rights of Publicity and Privacy*, § 6.4[F][6][a], at 6-34 (1994). At the same time it passed § 990, the legislature passed a companion statute, Cal. Civ. Code § 3344, creating a property interest in pre-death publicity rights.

Nothing in *Lugosi* or the legislative history of § 990 carves out a special niche for heirs in preference to devisees and inter vivos transferees. Moreover, defendant's analysis is contrary to the reasoning of the only reported case in this circuit interpreting § 990. *See, Joplin Enterprises v. Allen*, 795 F. Supp. 349, 350 (W.D. Wash. 1992) (court states in general discussion that Joplin's "right of publicity descended to her devisees" when she died in 1972).

2. Whether the 1935 Assignment transferred Yogananda's § 990 rights to plaintiff.

Under this query, the court will address three subissues: (1) whether § 990 requires a transfer to be express; (2) whether prior rulings regarding the 1935 Assignment

preclude a finding that Yogananda transferred his publicity rights to plaintiff; (3) whether the evidence supports an intent to transfer publicity rights via the 1935 Assignment.

a. Express transfer argument.

In its partial summary judgment motion, defendant contends that the 1935 Assignment could not have transferred Yogananda's publicity rights to plaintiff because a transfer of § 990 rights must, under the statute be "express." To refute this argument plaintiff correctly cites the rule that statutory language, if clear and unambiguous, is conclusive. *See Cervantez v. Sullivan*, 719 F. Supp. 899, 910 (E.D. Cal. 1989). As outlined above, nothing in the statute supports a preference for heirs, and defendant's "express transfer" argument must be rejected.

b. Effect of prior rulings re 1935 Assignment.

Our prior rulings established that plaintiff is not entitled to copyright protection regarding certain of Yogananda's writings. *See* July 1, 1992 Order After Hearing. Plaintiff established a presumption of protection as to those writings, by producing copyright notices for the writings and evidence of a 1935 Assignment[1], transferring all property Yogananda owned or would own to

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[1] The 1935 Assignment reads in relevant part as follows:

> For value received, I do hereby sell, assign, transfer and set over unto Self Realization Fellowship Church the within Books, lessons, monthly praeceptum, furnitures, personal properties including shawls,

plaintiff. Defendant rebutted this presumption, however, by producing evidence of Yogananda's and plaintiff's later actions which disproved a 1935 intent to transfer a prospective interest in all future writings. Of critical importance was evidence that Yogananda copyrighted some post 1935 writings in his own name, and plaintiff copyrighted some of Yogananda's writings as works for hire rather than as assignee. This court found unpersuasive plaintiff's attempt to counter this proof with evidence of Yogananda's 1915 "vow of poverty," because the vow appeared to be a "simple" rather than a "solemn" vow. *See Schmid Brothers, Inc. v. W. Goebel Porzellanfabrik K.G.*, 589 F. Supp. 497, 503-505 (E.D. N.Y. 1984).

Defendant now requests that we extend our prior rulings to preclude plaintiff's copyright claims regarding publicity rights. Defendant claims the issue of transfer of publicity rights is governed by "law of the case" in light of finding #1 set out above at p. 2. The equitable doctrine of law of the case does not limit or power to reopen an issue, but merely counsels against the equities of doing so in certain instances. *Rent-A-Center v. Canyon Television & Appliance*, 944 F.2d 597, 601-02 (9th Cir. 1991). Moreover, the referenced ruling addresses whether the 1935 Assignment transferred interests yet to come into existence. At

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blankets, portable temple of silence, my handwritings, typewriters, mimeograph machine, cooking utensils and all machinery, icebox, files, victrola, radio, and/or any other personal property which I may own and which is not described or enumerated herein. *See* Exh. BB to the compliant [sic].

the time of the 1935 Assignment, however, Yogananda's common law publicity rights were already in existence.[2]

c. **Whether the evidence supports an intent to transfer publicity rights via the 1935 Assignment.**

The final sub-issue under query 2 is whether the evidence shows, as a matter of law, that the 1935 Assignment transferred Yogananda's § 990 rights to plaintiff. In requesting summary judgment on the § 990 claim, plaintiff asserts that its previously-submitted evidence proves no genuine dispute exists whether the 1935 Assignment transferred Yogananda's § 990 interests to plaintiff. Much of this evidence, however, was lodged with the court on a procedurally defective motion for reconsideration. Here, we cannot rule in plaintiff's favor where it fails to resubmit that evidence and explicate its application to the instant motions. Plaintiff has not shown a reasonable jury must find in its favor, and its motion for partial summary judgment must be **denied**.

Defendant similarly neglects to offer or analyze the evidence regarding intent to transfer, instead attempting to ride the coat-tails of its prior victories.

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[2] The court leaves for another day an analysis of the interplay between common law publicity rights and statutory publicity rights under Cal. Civ. Code § 990 and § 3344.

3. Defenses to the § 990 claim.

To completely resolve defendant's motion for partial summary judgment on the § 990 claim, we take up as our third query the question of defenses. Defendant argues that, as a matter of law, its uses of Yogananda's name and likeness fall within the defenses of noncommercial use and the § 990 public affairs exemption. To meet its burden of proof on the defenses, defendant offers a blanket statement by its corporate secretary that Yogananda's name, photograph, and likeness are used "only for activities which further the underlying religious goals and activities" of defendant's religion. *See*, Exhibits in Support of Defendant's Motion for Partial Summary Judgment, Declaration of Parojinog, 2:27 - 3:8. Nonetheless, it is clear that some uses by defendant may violate plaintiff's § 990 rights while others do not. Defendant fails to meet its burden of establishing that each alleged act of infringement is permissible within § 990.

Because neither the first, second, nor third query above is resolved in defendant's favor, its motion for partial summary judgment must be **denied**.

C. Defendant's motion for partial summary judgment on plaintiff's fifth claim for relief (Cal. Civ. Code § 980).

This court will next consider defendant's motion for partial summary judgment on plaintiff's claim of common law copyright infringement, under California Civil Code § 980 (§ 980). Plaintiff's § 980 claim challenges

defendant's publication of four audio recordings, containing the following seven Yogananda talks:

1. "Thanksgiving Talk" (11/20/51);
2. "Last Birthday Talk" (1/5/52);
3. "How To Smile At All Times" (1/29/50);
4. "Easter Sunrise Service Talk" (3/25/51);
5. "Christmas Meditation Talk" (12/23/51);
6. "Lake Shrine Dedication Talk" (8/20/50);
7. "Follow the Path of the Great Ones" (two talks, dated 2/25/50 & 8/26/51).

Defendant admits to publishing tapes of the first six talks, but denies publication of the seventh. Defendant also claims a statute of limitations defense as to the seventh talk. Plaintiff fails to rebut defendant's assertions as to the seventh talk, so defendant's motion as to the talks combined under the title "Follow the Path of the Great Ones" is hereby **granted**.

As to the other six talks, we must first define the law governing sound recordings fixed prior to 1972. Federal law protects sound recordings fixed after this date, while earlier-fixed recordings receive only common law protection. 1 M. NIMMER & D. NIMMER, *Nimmer on Copyright* § 2.10[B][1] at 2-172.10-11. The California legislature enacted Cal. Civ. Code § 980(a)(2) to codify state common law protection of sound recordings fixed before 1972. Given the apparent legislative intent to coordinate § 980(a)(2) with the federal copyright act, we will look to federal law to construe the statute. Applicable federal copyright law in the case before us is the Copyright Act of 1909.

The *sine qua non* for any claim of copyright, either statutory or common law, is that "the person claiming copyright must himself be the author, or he must have succeeded to the rights of the author." 1 *Nimmer on Copyright, id.* § 5.01[A], at 5-3. Defendant here challenges plaintiff's § 980 claim on the grounds that plaintiff is neither the author of the sound recordings nor the author's successor in interest. Plaintiff's opposition apparently concedes it is not the author of the audio-recordings, but claims it is a successor in interest via the 1935 Assignment.

In arguing for partial summary judgment on the § 980 claim, defendant again relies on our prior rulings as dispositive. These prior rulings are not dispositive based on the doctrine of "law of the case," for the reasons discussed above. Prior rulings reflect this court's consideration of copyright to Yogananda's writings, but copyright to sound recordings requires a different analysis. As noted above, prior rulings rest heavily on the probative value of evidence of Yogananda and plaintiff's post-1935 conduct, as related to copyright of Yogananda's writings. On the issue of intent to transfer rights to sound recordings, no such compelling evidence has been presented.

In sum, the court hereby limits application of its finding #1, set forth above, to questions of copyright of Yogananda's writings. That given, defendant fails to meet its initial burden in challenging plaintiff's § 980 claim, and its motion for partial summary judgment on plaintiff's fifth cause of action must be denied.

D. Cross-motions for partial summary judgment on plaintiff's third claim for relief (federal copyright infringement) (nine photographs.)

Plaintiff and defendant both seek partial summary judgment on plaintiff's third claim for federal copyright infringement, regarding nine photographs first published in plaintiff's periodicals. Plaintiff alleges defendant infringed these copyrights by publishing the photographs in its own periodicals.

Plaintiff challenges defendant's use of the following photographs (descriptions are taken from allegations in plaintiff's moving brief):

1. "PY (Paramahansa Yogananda) at Biltmore," taken on March 7, 1952 by Arthur Say, who donated the photo to SRF.

2. "PY & Rajarsi," taken by Clifford Frederick on August 25, 1951.

3. "PY on Boat, India," taken by unknown person (at Richard Wright's behest) on January 31, 1936.

4. "PY 1925, w/ crossed arms," taken by unknown person in 1925.

5. "PY 1951, Mt. Washington," taken by Clifford Frederick on June 5, 1951.

6. "PY en route to Alaska," taken by unknown person in September 1924.

7. "Rajarsi Janakananda in Lotus Posture," taken by Durga Mata between 1952 and 1955.

8. "Rajarsi at Desk," taken by unknown person around 1937.

9. "PY, Meyers party," taken by Clifford Frederick on July 31, 1949.

To determine copyright to the photographs, we must apply the law of derivative copyright. *See,* 1 *Nimmer on Copyright* § 3.01, 3-2 – 3-8. As a general rule, a certificate of copyright registration is sufficient to create a presumption of validity, showing chain of title or assignment, so long as no copyright was previously registered in the name of another. *See e.g.* 17 U.S.C. § 209 (1909); 2 *Nimmer on Copyright, id.* at § 12.11[C]. Plaintiff here attempts to claim a presumption of validity, based on its derivative copyright to the periodicals in which the photographs were first published.

A close review of the law, however, does not support a presumption under these circumstances. In short, "derivative copyright" appears as an exception to the rule of presumptive validity. Under this exception, a derivative copyright in a collective work does not create a copyright to individual, copyrightable contributions authored by others. *See, e.g., Frederick Warne & Co., Inc. v. Book Sales, Inc.,* 481 F. Supp. 1191, 1197 (S.D. N.Y. 1979); *Mills Music, Inc. v. Cromwell Music, Inc.,* 126 F. Supp. 54, 65 (S.D. N.Y. 1954). Case law under the 1909 Copyright Act established this exception, and it was codified in the 1976 Act. 17 U.S.C. § 201(c) (1976).[3]

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[3] The case of *Russell v. Price,* 612 F.2d 1123 (9th Cir. 1979) sets forth the "well-established doctrine" that, under the 1909 Act, "a derivative copyright protects only the new material contained in the derivative work, not the matter derived from the underlying work" (*citing* 1 *Nimmer On Copyright* § 3.04 (1979)).

Plaintiff insists on a contrary rule, but its cases are inapposite. *Academy of Motion Picture Arts and Sciences v. Creative*

This analysis is reflected in our finding #2, set forth above, from this court's January 4, 1994 Order. Given that plaintiff is entitled to no benefit of a presumption, we resolve the instant motions as follows.

The photos "PY 1925, w/ crossed arms," "PY en route to Alaska," and "Rajarsi at Desk" were concededly taken by unknown authors. As to these three photos, the query ends here. Plaintiff has no benefit of a presumption. In conceding it does not know who took the photographs, plaintiff effectively concedes it cannot show chain of title at trial. As to the remaining six photographs, plaintiff offers the Declaration of Ananda Mata as evidence of the photographs' origin.

House Promotions, Inc., 944 F.2d 1446, 1451-52 (9th Cir. 1991) does not involve collective works or derivative copyrights at all. The case of *Abend v. MCA, Inc.*, 863 F.2d 1465, 1471 & n. 6 (9th Cir. 1988), *aff'd sub nom Stewart v. Abend*, 495 U.S. 207, 110 S.Ct. 1750 (1990) involves derivative copyrights, but is limited to an analysis of renewal rights as to separately registered contributions to periodicals, under § 24 of the 1909 Act. Here, the photographs were not separately registered and renewal rights under § 24 are not at issue.

Exceptions to the exception, which plaintiff would have the burden to establish, exist where the materials in question are (1) *not* independent contributions (*Markham v. A.E. Borden Co.*, 206 F.2d 199, 201 (1st Cir. 1953); *Shapiro Bernstein & Co. v. Bryan*, 123 F.2d 697 (2d Cir. 1941)); or (2) organizational, typographical, or editorial materials considered to be an integral part of the magazine (*See Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 111 S.Ct. 1282, 1289 (1991); *New Fiction Publishing Co. v. Star Co.*, 220 F. 994, 997 (S.D. N.Y. 1915); *Triangle Publications, Inc. v. Knight Rider Newspapers, Inc.*, 445 F. Supp. 875, 879 (S.D. Fla. 1978), *aff'd* 626 F.2d 1171 (5th Cir. 1980)). Plaintiff makes no attempt to show it comes within one of these exceptions to the derivative works copyright limitation.

The federal rules require that an affidavit supporting or opposing a motion for summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Fed.R.Civ.P. 56(e); *see also Hal Roach Studios v. Richard Feiner and Co.*, 896 F.2d 1542 (9th Cir. 1990). Through subsection (f) of the same rule, a party may seek continuance where such admissible evidence is not available at the time of the motion. Fed.R.Civ.P. 56(f). To establish personal knowledge, a party must present foundational facts showing a witness observed or had opportunity to observe the occurrences to which he testifies. *See U.S. v. Lyon*, 567 F.2d 777 (8th Cir. 1977), *cert. den.* 435 U.S. 918, 98 S.Ct. 1476. It is insufficient for a witness to state she "knew" or "thought" a certain event occurred. *See McLendon v. Georgia Kaolin Co., Inc.*, 782 F. Supp. 1548 (M.D. Ga. 1992).

Applying these rules to plaintiff's proffered evidence, plaintiff's evidence is insufficient to withstand summary judgment. As to "PY on boat, India," Mata merely avers the photograph was taken "at SRF's instance and expense." This averment is per se insufficient to establish chain of title. Mata makes specific allegations concerning who took each of the other five photographs, and when. However, the basis for Mata's knowledge is not apparent. Mata declares she is the secretary/treasurer of plaintiff church and that she testifies from personal knowledge, but she does not state she witnessed the photographs being taken.

Moreover, the accuracy of Mata's memory concerning events occurring approximately a half century ago

appears doubtful, especially in light of Mata's lack of memory during her sworn deposition testimony. *See* Exhibits in Support of Defendant's Motion for Summary Judgment, depo. of A. Mata 382:9-25, 384:2-25, 385:12. A declaration which contradicts earlier sworn testimony is inadequate to create a genuine issue of fact. *Radobenko v. Automated Equipment Corp.*, 520 F.2d 540, 544 (9th Cir. 1975).

Mata's supplemental declaration does not repair this evidentiary deficiency. Therein, Mata merely states she has had responsibility, from the mid 1940's on, of maintaining SRF photographic files and making sure photographs were taken of significant SRF events. If this is intended as evidence of habit or routine to prove conduct on a particular occasion in conformity therewith, plaintiff has not laid a proper foundation. Fed. R. of Evid. 406. Mata goes on to state that some of the photographs were taken under the instruction of either herself or Yogananda. Because of its uncertainty, this statement belies rather than bolsters Mata's basis of personal knowledge.

All in all, plaintiff provides insufficient competent evidence to establish chain of title to any of the nine photographs. Nor has plaintiff requested a Rule 56(f) continuance. Showing when the photos were taken and by whom is a necessary predicate of plaintiff's final two theories of copyright ownership to the photographs – that they were either works for hire or corporate body works. Thus, plaintiff also fails to meet its burden in arguing ownership of the photographs through either of these theories.

As the Ninth Circuit has stated, "the very object of summary judgment is to separate real and genuine issues from those that are formal or pretended, so that only the former may subject the moving party to the burden of trial." *Radobenko v. Automated Equipment Corporation*, 520 F.2d 540, 544 (9th Cir. 1975). Here, the factual issues created by plaintiff are not properly characterized as genuine, such that a reasonable jury could find plaintiff holds copyrights in the nine photographs.

For these reasons, this court hereby **grants** defendant's motion for partial summary judgment on plaintiff's third cause of action for federal copyright infringement, as to the nine above-listed photographs. Plaintiff's cross-motion on the same claim is **denied.**

E. Defendant's motion for caption change.

Defendant seeks to amend the caption of the case, changing defendant's name from "Church of Self-Realization" to "Ananda Church of Self-Realization." Plaintiff does not oppose this request. The court hereby **orders** that the caption be amended, changing defendant's name from "Church of Self-Realization" to "Ananda Church of Self Realization."

F. Federal copyright law preemption of state law claims.

It appears to the court that plaintiff's fourth, sixth, seventh and eighth causes of action may be preempted by federal copyright law. *See* 17 U.S.C. § 301; *Motown Record Corp. v. George A. Hormel & Co.*, 657 F. Supp. 1236, 1238-40

(C.D. Cal. 1987). Federal law preemption of state law claims may place in question the subject matter jurisdiction of the district court. Therefore, defendant is hereby **ordered** to bring a motion on the preemption issue pursuant to the local rules.

IT IS SO ORDERED.

Dated: 6/2/94

/s/ Edward J. Garcia
EDWARD J. GARCIA, JUDGE
UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

SELF-REALIZATION FELLOWSHIP CHURCH,

Plaintiff,

v.

ANANDA CHURCH OF SELF-REALIZATION; FELLOWSHIP OF INNER COMMUNION; and JAMES DONALD WALTERS,

Defendants.

_____/

CIV. NO. S-90-0846 EJG/PAN

ORDER CLARIFYING PRIOR ORDERS AND DISMISSING REMAINING CLAIMS

(Filed Oct. 20, 1997)

This matter was before the court on October 16, 1997, for a status conference. James Clark appeared on behalf of plaintiff. Robert Christopher and Sheila Rush appeared on behalf of defendants. After hearing, the court entered the following order.

1. At plaintiff's request, and to remove any ambiguities that may exist, the court clarifies that all of its prior orders in this case concerning the claims for relief set forth in plaintiff's complaint against defendants were and are limited solely to the specific works, names, and marks sued upon by plaintiff in those claims for relief.

2. All claims in defendants' first amended counterclaim have been previously dismissed or withdrawn.

3. At plaintiff's request, any and all remaining claims within plaintiff's complaint are hereby dismissed

with prejudice pursuant to Federal Rule of Civil Procedure 41(a)(2).

4. Each party is to bear its own fees and costs.

5. Judgment is entered with respect to this entire action, including all claims and counterclaims.

IT IS SO ORDERED.

Dated: October 16, 1997

/s/ Edward J. Garcia
EDWARD J. GARCIA, JUDGE
UNITED STATES
DISTRICT COURT

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SELF-REALIZATION FELLOWSHIP CHURCH, a California corporation, Plaintiff-Appellant, v. ANANDA CHURCH OF SELF-REALIZATION, a California corporation; FELLOWSHIP OF INNER COMMUNION, a California corporation; JAMES WALTERS, aka Sri Kriyananda, Defendants-Appellees.	No. 97-17407 D.C. No. CV-90-00846-EJG **ORDER** (Filed July 19, 2000)

Before: SCHROEDER, NOONAN, and TASHIMA, Circuit Judges

The panel as constituted above has voted to deny the petition for rehearing and the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed.R. App.P. 35.

The petition for rehearing and the petition for rehearing en banc are denied.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

October 10, 2000

Mr. Louis P. Petrich
2049 Century Park East
Suite 3110
Los Angles, CA 90067-3274

Re: Self-Realization Fellowship Church
v. Ananda Church of Self-
Realization, et al.
Application No. 00A300

Dear Mr. Petrich:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice O'Connor, who on October 10, 2000, extended the time to and including November 16, 2000.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, CLERK

By /s/ Jeffrey D. Atkins
Jeffrey D. Atkins
Assistant Clerk

NOTIFICATION LIST

Mr. Louis P. Petrich
2049 Century Park East
Suite 3110
Los Angeles, CA 90067-3274

Mr. Robert Christopher
Coudert Brothers
303 Almaden Boulevard, 5th Fl.
San Jose, CA 95110-2721

Clerk
United States Court of Appeals for
the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

U.S. Constitution

Amendment I. Freedom of Religion

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *

AMENDMENT XIV – CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Excerpts from the 1909 Copyright Act

Sec. 24. Duration; Renewal and Extension

The copyright secured by this title shall endure for twenty-eight years from the date of first publication,

whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name: *Provided*, That in the case of any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further*, That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further*, That in default of the registration of such application for renewal and extension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication.

Sec. 26. Terms Defined

. . . the word "author" shall include an employer in the case of works made for hire.

Excerpts From The Copyright Act of 1976

17 U.S.C. § 101

A "work made for hire" is –

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work[1] as a sound recording,[2] as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is a

literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

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§ 201. Ownership of copyright

(a) Initial Ownership. – Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are coowners of copyright in the work.

(b) Works Made for Hire. – In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

* * *

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§ 302. Duration of copyright: Works created on or after January 1, 1978

(a) In General. – Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and 70 years after the author's death.

* * *

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§ 304. Duration of copyright: Subsisting copyrights

(a) Copyrights in Their First Term on January 1, 1978. – (1)(A) Any copyright, the first term of which is subsisting on January 1, 1978, shall endure for 28 years from the date it was originally secured.

(B) In the case of –

(i) any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or

(ii) any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire,

the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of 67 years.

(C) In the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work –

(i) the author of such work, if the author is still living,

(ii) the widow, widower, or children of the author, if the author is not living,

(iii) the author's executors, if such author, widow, widower, or children are not living, or

(iv) the author's next of kin, in the absence of a will of the author,

shall be entitled to a renewal and extension of the copyright in such work for a further term of 67 years.

(2)(A) At the expiration of the original term of copyright in a work specified in paragraph (1)(B) of this subsection, the copyright shall endure for a renewed and extended further term of 67 years, which –

(i) if an application to register a claim to such further term has been made to the Copyright Office within 1 year before the expiration of the original term of copyright, and the claim is registered, shall vest, upon the beginning of such further term, in the proprietor of the copyright who is entitled to claim the renewal of copyright at the time the application is made; or

(ii) if no such application is made or the claim pursuant to such application is not registered, shall vest, upon the beginning of such further term, in the person or entity that was the proprietor of the copyright as of the last day of the original term of copyright.

(B) At the expiration of the original term of copyright in a work specified in paragraph (1)(C) of this subsection, the copyright shall endure for a renewed and extended further term of 67 years, which –

(i) if an application to register a claim to such further term has been made to the Copyright Office within 1 year before the expiration of the original term of copyright, and the claim is registered, shall vest, upon the beginning of such further term, in any person who is entitled under paragraph (1)(C) to the renewal and extension of the copyright at the time the application is made; or

(ii) if no such application is made or the claim pursuant to such application is not registered, shall vest, upon the beginning of such

further term, in any person entitled under paragraph (1)(C), as of the last day of the original term of copyright, to the renewal and extension of the copyright.

* * *

(b) Copyrights in Their Renewal Term of Registered for Renewal Before January 1, 1978. – The duration of any copyright, the renewal term of which is subsisting at any time between December 31, 1976, and December 31, 1977, inclusive, or for which renewal registration is made between December 31, 1976, and December 31, 1977, inclusive, is extended to endure for a term of seventy-five years from the date copyright was originally secured.

* * *